Supreme Court, U.S.
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No. 95 420

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison, *Petitioner*,

v.

FRED BERRE DOUGLAS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI FROM DENIAL OF MANDAMUS

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APPENDIX A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed 5/10/95

FRED BERRE DOUGLAS,	) No. CV -91) 3055 RSWL) DEATH PENALTY
Petitioner,	) CASE
v.	)
ARTHUR CALDERON, Warden of San Quentin State Prison,	) ORDER DENYING) RESPONDENT'S) MOTION TO) DECIDE PETITION) FOR WRIT OF) HABEAS CORPUS
Respondent.	)

On April 19, 1995, respondent filed a motion requesting that the Court rule immediately on petitioner's pending petition for writ of habeas corpus. Respondent complains that there has been an unreasonable 4-year delay in this case. The motion contains an incomplete recitation of the procedural history in this case; therefore, the Court sets out the chronology of the federal case:

Petitioner first sought appointment of counsel on June 6, 1991.

The Court appointed counsel on November 8, 1991.

The Court granted a 120-day stay and a 180-day stay, but then granted only a 60-day stay even though a 180-day stay was sought.

Petitioner filed his habeas petition on November 16, 1992.

Respondent refused to waive exhaustion and on December 23, 1992 moved for either a dismissal of the petition or to hold the federal proceedings in abeyance pending exhaustion.

After receiving briefing on the exhaustion issue, the Court on February 12, 1993 found the petition contained unexhausted claims and granted petitioner 60 days to file a petition in state court.

The Court granted petitioner two 30-day extensions, before denying a third request to extend the filing date in state court.

Petitioner filed a state habeas petition on June 21, 1993.

After receiving informal briefing, the California Supreme Court denied the petition on the merits on October 14, 1993;

On November 18, 1993, at the request of the Court, the parties stipulated to a briefing schedule for the amended petition, answer, and traverse.

On January 7, 1994, 3 days before the amended petition was due, the Court denied petitioner's request for a stay of proceedings pending the filing of a petition for certiorari regarding the denial of the state habeas petition.

Petitioner filed his amended petition on January 19, 1994;

On March 4, 1994, respondent requested and received a 30-day extension for filing the answer. The Court also gave petitioner an additional 30 days to file his traverse.

Respondent filed the answer on April 18, 1994.

On June 16, 1994, the Court denied petitioner's request for a 60-day extension of time to file the traverse.

Petitioner filed a traverse on June 24, 1994;

On July 29, 1994, the Court set a briefing schedule for petitioner's motion for an evidentiary hearing;[1]

Petitioner filed a motion for an evidentiary hearing on October 3, 1994.

Respondent filed an opposition on October 31, 1994;

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1. When setting the briefing schedule, the Court was mindful that it had just granted petitioner some funds to investigate claims after denying two previous applications for funds.

Petitioner filed a reply on November 14, 1994.

The motion for an evidentiary hearing has been under submission since that time.

As can be seen in this chronology, the case has moved along at a steady rate since the beginning. Indeed, the Court denied at least four requests by petitioner to extend time to file documents. Respondent's claim of a 4-year delay in this case is misleading and his characterization of the delay as "unreasonable" is unsupported by the facts.

This Court does not condone delay in this case. On the other hand, the Court has a responsibility to give both parties a "full and fair consideration to all issues presented in the case." In re Blodgett, 502 U.S. 236, 240 (1992). To give both parties a fair ruling on the evidentiary hearing motion, the Court must review the over 4,000 pages of trial transcripts, as well as the voluminous pleadings filed in

this Court.[2] When the Court has completed its review, it will issue a ruling on the motion.

Before concluding, the Court notes that responding to a factually inaccurate and legally insubstantial motion such as this takes scarce judicial resources away from other more pressing matters and does nothing to further the litigation.[3] Respondent's motion for an immediate ruling on the petition itself is DENIED.

IT IS SO ORDERED.

Dated: May 9, 1995

Ronald S.W. Lew
United States District Judge

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2. The Court notes that the pleadings on the motion consume 140 pages. In addition, the amended petition is 170 pages, the answer is 357 pages (including exhibits), and the traverse is another 100 pages.

3. The court further notes that respondent spent a large portion of the motion arguing why an evidentiary hearing was unnecessary in light of a recent Ninth Circuit decision. Such argument would be more properly made in a supplemental opposition rather than in a motion to rule on the entirety of the petition.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed August 3, 1995

ARTHUR CALDERON, Warden,	No. 95-70497
Petitioner,	DC No. CV 91-03055 RSWL
vs.	
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,	ORDER
Respondent,	
FRED BERRE DOUGLAS,	
Real Party in Interest.	

Before: NORRIS, NOONAN AND O'SCANNLAIN, Circuit Judges

Petitioner's Petition for Writ of

Mandamus is DENIED

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 93 - 70578

SAMUEL L. LEWIS, Director,
Arizona Department of
Corrections, GRANT WOODS,
Arizona Attorney General,

Petitioners,

vs.

UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF ARIZONA,

Respondent,

MICHAEL EMERSON
CORRELL, JOSE ROBERTO
VILLAFUERTE, ANTHONY
LEE CHANEY, JIMMY ALAN
ARNETT, JOSE JESUS
CEJA,

Real Parties in Interest.

ON PETITION FOR WRIT
OF MANDAMUS TO THE
UNITED STATES COURT
FOR THE DISTRICT OF
ARIZONA

CIV-87-1471-PHX-SMM
CIV-91-0729-PHX-SMM
CIV-85-2266-PHX-RCB
CIV-83-2157-PHX-SMM
CIV-84-2322-PHX-RCB

PETITION FOR WRIT OF MANDAMUS

Grant Woods
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Criminal Appeals Section

STATEMENT OF THE FACTS

Correll v. Lewis, No. CIV 87-1471-PHX-SMM

Michael Emerson Correll is an inmate in the Arizon State Prison sentenced to be executed. On September 15, 1987, Correll flied a Petition for Writ of Habeas Corpus and an Application for Stay of Execution. (Exhibits A and B.) On September 18, 1987, the District Court of Arizona issued an order staying the scheduled execution of Correll. (Exhibit C.) On October 2, 1987, the District Court appointed two attorneys to represent Correll in the habeas corpus proceeding. (Exhibit D.) Later the court granted Correll's request to amend the petition. (Exhibit E.) On February 24, 1988, Correll flied an Amended Petition for Writ of Habeas Corpus. (Exhibit F.)

On April 10, 1989,[4] the State filed a motion to dismiss the amended petition because Correll had

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4. The delay in the filing of a response to Correll's amended petition was due to oversight in the District Court Clerk's Office in that it failed to serve the state with copies of any of the District Court's orders. (Exhibit G.)

not exhausted state court remedies. (Exhibit H.) On June 5, 1989, the District Court denied the State's motion to dismiss, and ordered a response to the petition. (Exhibit I.) After this Court issued its opinion in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), the District Court stayed all proceedings related to Correll's death sentence, but ordered the proceedings related to the remainder of the claims to continue. (Exhibit I.)

On September 7, 1989, the State filed two separate motions for summary judgment. (Exhibit K.) On November 15, 1989, Correll filed a response to the State's Motions for Summary Judgment, and the State replied on December 4, 1989. On February 10, 1990, Correll filed another motion to amend the petition raising two additional claims. (Exhibit L.) The State opposed Correll's request. (Exhibit M.) On March 14, 1990, the District Court granted Correll's request to amend the petition. (Exhibit N.) On April 2, 1990,

the State filed a summary judgment motion on the newly added claims. (Exhibit O.) The District Court took no action on the State's motions.

In 1991, when the District Court learned that the State was preparing a mandamus petition against the Court for failing to act on the summary judgment motions, the court ordered a status conference on the petition. (Exhibit P.) On October 4, 1991, the District Court vacated the State's summary judgment motions, and allowed Correll to amend his petition one more time. (Exhibit Q.)

On December 6, 1991, Correll filed his Third Amended Petition for Writ of Habeas Corpus. (Exhibit R.) On February 14, 1992, the State again filed a Motion for Summary Judgment. (Exhibit S.) On May 15, 1992, Correll filed a response to the State's summary judgment motion, and the State replied on May 29, 1992. In conjunction with his response to the motion for summary judgment, Correll

moved to expand the record with material never presented to the state courts. (Exhibit T.) The State objected to the motion. (Exhibit U.) On June 19, 1992, the District Court heard argument on the respective motions and stated, "The court will enter a formal written order in this matter." (Exhibit V.)

After waiting over 9 months for the Court's written order, the State filed a request for ruling. (Exhibit W.) The State pointed out the extreme length of time that had passed since Correll filed his original petition with the court. (Exhibit W at 2.) The State asked, pursuant to *In re Blodgett*, ___ U.S. ___, 112 S. Ct. 674, 116 L. Ed. 2d 669 (1992), that the court "exercise all due diligence and render its opinion forthwith." The District Court has not responded to the State's request for ruling, nor has it ruled on the State's Motion for Summary Judgment.

Villafuerte v. Lewis, No. CIV-91-0729-PHX-SMM.

Jose Roberto Villafuerte is an inmate in the Arizona State Prison sentenced to be executed. On May 9, 1991, Villafuerte filed a Preliminary Petition for Writ of Habeas Corpus and an Application for Stay of Execution in the District Court. (Exhibit A.) On May 14, 1991, the District Court issued a stay of the execution and appointed counsel for Villafuerte. (Exhibit B.) On July 19, 1991, Villafuerte filed an amended petition. (Exhibit C.) On August 26, 1991, Respondents filed a motion for summary judgment on all issues in the amended petition. (Exhibit D.) Villafuente filed a response and Respondents filed a reply. On March 16, 1992, the District Court heard oral argument on the motion for summary judment. As of this date, the District Court has not ruled on Respondent's motion for summary judgment although more than 15 months have passed since oral argument on the motion.

Chaney v. Lewis, No. CIV-85-2266-PHX-RCB

The Arizona Supreme Court affirmed Chaney's conviction and death sentence in *State v. Chaney*, 141 Ariz. 295, 686 P.2d 1264 (1984). Chaney filed a federal habeas corpus petition on October 8, 1985. (Exh. A and B.) The District Court denied the petition, and Chaney appealed. This Court remanded the case on November 28, 1986. *Chaney v. Lewis*, 801 F.2d 1191 (9th Cir. 1986), cert. den. 481 U.S. 1023 (1987). After remand, the State requested that the District Court set a briefing schedule. (Exhibit C.) The District Court granted the State's request, and the State filed its answer on July 17, 1987. (Exhibits D. and E.) The District Court stayed the proceedings on January 13, 1989, pending a mandate in *Adamson v. Ricketts*. (Exhibit A.) After the United States Supreme Court issued *Walton v. Arizona*,[5] the State requested a ruling on the merits on March 7, 1991.

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5. 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990).

(Exhibit A.) In October 1991, the State requested that the District Court lift its stay. (*Id.*)

Chaney then changed counsel. (Exhibit A.) The District Court ordered Chaney's new counsel to file an amended petition by February 14, 1992. (Exhibit F.) In April 1992, the District Court advised Chaney's counsel that further continuances for the amended petition would not be granted. (Exhibit H.) Chaney then requested that his federal petition be held in abeyance so that he could return to the state court to pursue yet another petition for post-conviction relief. (Exhibit H.) The State opposed Chaney's request. (Exhibit I.)

Chaney finally filed his amended petition on September 4, 1992. (Exhibit I.) The State responded on November 3, 1992. (Exhbit K.) In December 1992, the District Court acknowledged that briefing was complete and the motion to hold in abeyance would be ruled upon as quickly as possible. (Exhibit L.) In

March 1993, the State again asked for a ruling on the meritsd. (Exhibit M.) The District Court has not responded to the State's request, nor ruled on the merits of the petition.

Arnett v. Lewis, No. CIV-83-2157-PHX-SMM

The Arizona Supreme Court first affirmed Arnett's conviction and death sentence in *State v. Arnett*, 119 Ariz. 38, 579 P.2d 542 (1978). Following the attack on the constitutionality of Arizona's death penalty statute, Arnett was resentenced and that sentence was affirmed in *State v. Arnett*, 125 Ariz. 210, 608 P.2d 778 (1980). Arnett filed his federal petition in 1983. (Exhibit B.) Arnett had failed to exhaust some of the issues he raised so while his petition was pending he returned to state court. (Exhibit C.) Arnett filed partial summary judgment motions and in February 1987, the District Court ruled on those motions. The court granted partial relief to Arnett to include another resentencing, and an evidentiary

hearing on the voluntariness of his confession. (Exhibit D.)

On March 6, 1987, the State sought a stay from the District Court because the Arizona Supreme Court has decided to hear Arnett's new state claims on the merits. (Exhibit E.) The District Court granted the stay. (Exhibit A.) In 1988, the Arizona Supreme Court again affirmed the conviction and death sentence in *State v. Arnett*, 158 Ariz. 15, 760 P.2d 1064 (1988). The State asked the District Court to lift the stay and grant a rehearing. (Exhibit F.) Arnett then asked to amend his petition to include the new issues recently decided by the Arizona Supreme Court. (Exhibit G.) The District Court lifted the stay but denied the State's motion for rehearing. The District Court allowed Arnett to amend his petition. (Exhibit H.)

For 2 years, discovery took place in anticipation of the federal evidentiary hearing on the voluntariness issue. (Exhibit A.) The parties filed

memorandums on the admissibility of the evidence. (Exhibits I, J and K.) In April 1992, Arnett filed a fourth motion for partial summary judgment on his amended petition. (Exhibit L.) The State filed its response on May 13, 1992. (Exhibit M.) The District Court has not ruled on Arnett's motion, nor has it set a date for the evidentiary hearing.

Ceja v. Lewis, No. CIV-84-2322-PHX-RCB

Jose Jesus Ceja is an inmate in the Arizona State Prison sentenced to be executed. On December 14, 1984, Ceja filed a Preliminary Petition for Writ of Habeas Corpus and an Application for Stay of Execution. (Exhibits A and B.) On December 14, 1984, the District Court of Arizona issued an order staying the scheduled execution of Ceja. (Exhibit C.) On February 28, 1985, Ceja moved to stay the federal proceedings pending the resolution of state post-conviction relief proceedings pending in state court. (Exhibit D.) The State opposed the motion to stay the

proceedings. (Exhibit E.) On March 28, 1985, the District Court granted Ceja's motion to stay the federal proceedings pending the disposition of proceedings in state court. (Exhibit F.)

On November 19, 1986, Ceja filed an Amended Petition for Writ of Habeas Corpus. (Exhibit G.) On May 6, 1987, the State moved to dismiss Ceja's petition for habeas corpus relief. (Exhibit H.) On June 24, 1987, the State replied to Ceja's motion to strike. (Exhibit J.) On October 9, 1987, the District Court denied Ceja's motion to strike, and ordered that Ceja file a response to the State's pending motion to dismiss within 10 days of the Court's order. (Exhibit K.) On November 30, 1987, Ceja filed a response to the State's motion to dismiss. (Exhibit L.) On February 5, 1988, the State replied. (Exhibit M.) On October 18, 1988, the District Court: (1) granted the State's motion to dismiss; (2) directed that the stay of execution would be vacated unless

Ceja filed an amended petition for writ of habeas corpus deleting those claims which the District Court determined were unexhausted; (3) ordered that if Ceja elected to amend his petition by deleting his unexhausted claims, Ceja must at the time of filing his amended petition file a statement showing cause and prejudice regarding the 20 claims which were held to be procedurally barred by the Arizona state courts. (Exhibit N.) On November 1, 1988, Ceja filed a motion to reconsider and vacate the October 18, 1988, order. (Exhibits O and P.) On November 3, 1988, the District Court granted Ceja's motion to stay the enforcement of the October 18, 1988, order. (Exhibit Q.) On November 16, 1988, the State opposed Ceja's motion to reconsider and vacate the October 18, 1988 order. (Exhibit R.)

On December 5, 1988, the District Court held oral argument on Ceja's motion to reconsider and vacate the memorandum and order. The District

Court took the matter under advisement. On May 1, 1989, Ceja filed a motion for partial summary judgment. (Exhibit S.) On May 24, 1989, the State moved to strike Ceja's motion for partial summary judgment. (Exhibit T.)

On July 22, 1989, the District Court ruled on Ceja's motion for reconsideration of the court's October 18, 1988 memorandum and order. The court ruled as follows: (1) denied Ceja's motion for reconsideration concerning issue 3 -- destruction of "gruesome photographs" and issue 4 concerning the jury instruction on malice; (2) granted Ceja's motion for reconsideration concerning issue 8 -- single form of the verdict and issue 12 -- Dr. Karnitschnig's affidavit -- by holding that the District Court could hear those claims on the merits; (3) stayed any further action in the matter pending receipt of the mandate from this Court in *Adamson v. Ricketts*; and (4) ordered the action would not be dismissed and that the stay of

execution would stay in effect until further order of the court. (Exhibit U.)

On November 4, 1991, after the United States Supreme Court decided *Walton v. Arizona*, and *Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990), the State moved to vacate the District Court's stay of July 22, 1989. (Exhibit V.) On December 18, 1991, the State filed a motion to reconsider the District Court's order of July 22, 1989. (Exhibit W.)

On January 27, 1992, Ceja filed a response to the State's motion for reconsideration. (Exhibit X.) On February 18, 1992, the District Court held oral argument on the State's motion to reconsider. The court indicated that it would rule shortly on the motion, and ordered Ceja to make his final *McCleskey* determination. (Exhibit Y.) On April 30, 1009, Ceja notified the District Court that he was unaware of any other claims. (Exhibit Z.)

On March 12, 1993, the State requested the District Court to rule on its motion for reconsideration. (Exhibit AA.) The District Court has not ruled on the State's request for ruling, or the motion for reconsideration.

ISSUE PRESENTED

Is District Court of Arizona taking "all steps necessary to ensure a "*prompt resolution*" of the capital habeas corpus cases pending before it?

RELIEF REQUESTED

Due to the inexcusable neglect that the District Court of Arizona has exhibited toward Arizona's capital cases, the State requests that this Court establish time periods within which the District Court must rule upon a capital habeas corpus petition, and order the District Court to rule on the present cases within those guidelines or show cause why those judges should not be held in contempt.

REASONS WHY THE WRIT SHOULD ISSUE

BECAUSE THE DISTRICT COURT HAS GRANTED STAYS OF EXECUTION IN THESE CAPITAL CASES, IT HAS A DUTY TO TAKE ALL STEPS NECESSARY TO ENSURE THE PROMPT RESOLUTION OF THE CASE; A DUTY THE DISTRICT COURT OF ARIZONA HAS FAILED TO FULFILL

Under the All Writs Act, 28 U.S.C. § 1651(a), the federal courts of appeal may issue a writ of mandamus when it is "necessaary or appropriate in aid of their respective jurisdictions." *Will v. Calvert Fire Insurance Company*, 437 U.S. 655, 661, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978); *Roche v. Evaporated Milk Ass'n.*, 319 U.S. 21, 63 S. Ct. 938, 87 L. Ed. 1185 (1943). The United States Supreme Court has long recognized this authority, and stated when it should be used.

> Application for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refused to hear and decide the controversy, or where such a court, having

> heard the case, refuses to render judgment or enter a decree in the case.

Ex Parte Newman, 81 U.S. (14 Wall.) 152, 165 (1872).

Although the time taken to issue a decision is generally within a court's discretion, a party may obtain a Writ of Mandamus when it shows that the court has abused its discretion. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84-85 (1970); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257 (1957).

The United States Supreme Court stated that it would not tolerate unreasonable delay in a capital case, and such a delay could be the basis of a mandamus petition:

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty *to take all steps necessary to ensure a prompt resolution of the matter*, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

In re Blodgett, ___ U.S. ___, 112 S. Ct. 674, 676, 116 L. Ed. 2d (1992) (emphasis added.) The State of Arizona maintains that the District Court of Arizona has

abused its discretion in the instant cases by not following the dictates of *In re Blodgett* and promptly resolving the matters before it.

In *In re Cement Antitrust Litigation* (*MDL No. 296*), 688 F.2d 1297 (9th Cir. 1982), this Court explained in detail the guidelines it would use to determine whether a mandamus petition was an appropriate remedy in a particular case. The guidelines described are: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief they desire; (2) whether the petition will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the District Court's actions are clearly erroneous as a matter of law; (4) whether the claimed error is oft repeated error or "manifests persistent disregard for the federal rules"; and (5) whether the petition raises new and important issues of law of first impression. 688 F.2d at 1301 (citing *Bauman v. United States*

District Court, 557 F.2d 650, 654-55 (9th Cir. 1977)). This Court refers to these five guides as the *Bauman* factors. *Id.* In *In re Cement Antitrust*, this Court noted that related considerations included whether the injury alleged by the petition was not correctable on appeal; whether the petition presents an issue that would repeatedly evade appellate review; or whether "there are other compelling factors relating to the efficient and orderly administration of the district courts." 688 F.2d at 1301. The State believes that, upon review of the *Bauman* guidelines and the related considerations noted in *In re Cement Antitrust*, all indications show that this Court should accept the instant petition and grant the relief requested by the State of Arizona.

A. MANDAMUS IS THE ONLY AVAILABLE MEANS TO ENSURE THE PROMPT RESOLUTION OF THE INSTANT CASE.

The first two *Bauman* guidelines are designed to insure that mandamus is the appropriate remedy. *In re Cement Antitrust*, 688 F.2d at 1301. A petition for

writ of mandamus to a higher court is the appropriate action when a inferior court refuses to act on a case pending before it.

> There can be no doubt that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue the writ [of mandamus] "in order that [it] may exercise the jurisdiction of review given by law."

Will v. Calver Fire Ins., 437 U.S. at 661-62 (quoting *Insurance Company v. Comstock*, 83 U.S. (16 Wall.) 258, 270 (1872)); *Ex Parte Newman*, 81 U.S. (14 Wall.) at 165. The State of Arizona has no other available remedy to ensure a prompt resolution of these cases except a mandamus petition.

Regarding the prejudice facing the State, the United States Supreme Court recognized the prejudice suffered by a state when a federal court refuses to act promptly on a habeas petition.

> None of the reasons offered in the response dispels our concern that the State of Washington has sustained *severe* prejudice by the *two-and-a-half* year stay of execution. The stay has prevented Washington from

> exercising its sovereign power to enforce the criminal law, an interest we found of great weight in [*McClesky v. Zant*] when discussing the importance of finality in the context of federal habeas corpus proceedings.

In Re Blodgett, 112 S. Ct. at 676, 116 L. Ed. 2d at 674 (citation omitted, emphasis added). As with the State of Washington in *Blodgett*, Arizona is suffering a severe diminution of its sovereign power:

> Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but *the power of a state to pass laws means little if the state cannot enforce them.*

McClesky v. Zant, ___ U.S. ___, 111 S. Ct. 1454, 113 L. Ed. 2d 517, 543 (1991) (emphasis added). The diminution of sovereignty is even greater for the State of Arizona in these cases because the federal courts have prevented the State from enforcing its criminal laws against each of the inmates for considerably longer than the "two-and-a-half" years condemned by the Court in *Blodgett*.

The District Court's apparent endless search for epistemological certainty on the issues before issuing a decision damages the very justice the court seeks:

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the underlying substantive commands . . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility.

McClesky v. Zant, 111 S. Ct. at 1469, 113 L. Ed. 2d at 543 (quoting Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452-53 (1963)). A court immobilized in its search for justice provides none. The District Court's duty is not to achieve absolute certainty on an issue before it, but simply, after due consideration, to decide it:

> With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. *We have no more right to decline the exercise of*

> *jurisdiction which is given, than to usurp that which is not given.*

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)(emphasis added). Ever-delayed justice is not justice at all.

The State of Arizona has clearly shown that under the first two *Bauman* factors the delay caused by the District Court's failure to rule can only be addressed in a mandamus petition and the State is prejudiced by the District Court's inaction. *In re Cement Antitrust*, 688 F.2d at 1301-02.

B. THE DISTRICT COURT'S FAILURE TO RULE PROMPTLY ON THE ISSUES BEFORE IT IS BEING OFT REPEATED, MANDATING THAT THIS COURT ACCEPT THE PETITION AND SUPERVISE THE ORDERLY ADMINISTRATION OF THE FEDERAL DISTRICT COURT OF ARIZONA.

The fourth and fifth factors noted in *Bauman* relate to whether the District Court is engaging in oft repeated error, or manifests a persistent disregard of its duty under law.[6] *In re Cement Antitrust*, 688 F.2d at 1303-04. The fourth and fifth factors also deal with whether the District Court's action presents new and important problems, or issues of first impression. *Id.* These factors also weigh in favor of the State in this Court's consideration of whether to accept the State's petition and grant the relief requested.

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6. The State has not discussed the third factor separately because the State is not seeking redress from a District Court order, but form the court's failure to rule. Therefore, the third factor is not directly relevant to the Court's inquiry because the failure or refusal to rule on a case properly before the court is without question the proper subject of a mandamus petition. *Ex Parte Newman.*

The attached chart shows the pervasiveness of the problem the State seeks to redress. Not only are the five selected cases abysmal in and of themselves, but in looking at the attached cases pending in the District Court, it is clear that the District Court of Arizona does not handle capital habeas corpus petitions in an expeditious fashion. Beside *Blazak v. Lewis*, 971 F.2d 1408 (9th Cir. 1992), the District Court had not finally disposed of a first petition in any capital case pending in that court for over 3 years.[7] Such a problem deserves drastic action by this Court.

In deciding whether to issue the supervisory mandamus petition, the Court is faced with an issue of first impression. Not only does the State seek an order from this Court directing the District Court to rule within the time certain on the six cases directly challenged in this mandamus petition; the State also

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7. The 3 years is of particular concern because it has been over 3 years since the United States Supreme Court upheld the Arizona Death Penalty statute in *Walton v. Arizona*.

requests that this Court, in its supervisorial authority, establish time periods within which the District Court must rule in capital habeas corpus petitions and direct the lower court to rule on all motions in all pending capital cases within those time limits. This request is a case of first impression, and is necessary to the orderly administration of justice.

As noted above, generally it is within a court's discretion when to issue an opinion. However, in *Blodgett*, the United State Supreme Court stated that the federal courts had a "duty" in capital cases to "*take all steps necessary to ensure a prompt resolution of the matter.*" 112 S. Ct. at 676, 116 L. Ed. 2d at 676 (emphasis added). Clearly the District Court of Arizona has failed to follow the *Blodgett* mandate. That leaves this Court and the State of Arizona with two options: First, the State may petition, in every capital case pending in the District Court, or those cases to be filed in the future with the District Court,

for a mandamus petition every time the District Court fails to rule promptly on a motion. Such a ruling would require constant inquires by this Court in hundreds of cases. Such a procedure would consume valuable court and attorney time.

The second option is for this Court to order that, in all capital cases pending before the District Court, that court has to rule within specified times on motions once they come at issue. The failure to rule within the time limit would be a prima facia case that the court has not complied with the *Blodgett* mandate, subjecting the lower court to an order to show cause. This option would establish guidelines to be followed in every case, obviating the need to relitigate the issue in every pending capital case.

The State believes the second alternative is clearly preferable to the first. The *Blodgett* mandate is clear, federal courts must establish procedures and practices to ensure "prompt" resolution of habeas corpus

petitions in capital cases. The District Court of Arizona has failed to do so. This Court must exercise control and establish guidelines that the lower court must obey. Setting time limits for ruling on motions allows the lower court some flexibility, but assures the State that the District Court's current practice of allowing Arizona's capital cases to languish in the District Court for 10 or more years before ruling will cease.

C. THE STATE REQUESTS THAT THIS COURT EXERCISE ITS SUPERVISORIAL AUTHORITY AND ESTABLISH A 120-DAY TIME LIMIT FOR RULING ON DISPOSITIVE MOTIONS, A 30-DAY TIME LIMIT FOR RULING ON PROCEDURAL MOTIONS, AND A 180-DAY TIME LIMIT FOR SCHEDULING AN EVIDENTIARY HEARING.

The State of Arizona believes that it should not take the District Court more than 120 days after a dispositive motion is at issue to rule. Likewise, it should not take the District Court more than 30 days after a procedural motion is at issue to rule on the merits of the motion. The entire state court record is before the court, with record citations and state court opinions. The parties will have briefed the issues citing the relevant cases. These time limits are ample time for the court to rule.

When the District Court determines that an evidentiary hearing is required, the State believes that the hearing should be set within 180 days. One hundred eighty days is more than the speedy trial

provisions of both the state and federal courts. It is baffling to the State why an evidentiary hearing in a collateral proceeding should require more preparation time than the trial.

The District Court of Arizona has failed to promptly resolve these habeas corpus petitions, and it is incumbent that this Court ensure that the mandate in *In re Blodgett* is satisfied. The State believes that establishing these time limits for the District Court to rule on pending capital habeas corpus petitions is not only warranted, but absolutely necessary for the orderly administration of justice.

CONCLUSION

For all of the above stated reasons, the State of Arizona respectfully requests that the Court grant the writ and order the respondent court to render its decision on the dispositive motions within 120 days, or rule on the procedural motions within 30 days. The State further requests that the District Court be

ordered to hold the evidentiary hearing in *Arnett* within 180 days. Furthermore, the State prays that the Court exercise its supervisorial authority and order that the District Court shall rule on all future capital cases within the time limits established, or it will be deemed to be prima facie evidence that an order to show case is warranted.

Respectfully submitted,

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